Know the Law: Reimbursement Under the IDEA

By Allan G. Osborne Jr., Ed.D., and Megan L. Rehberg, J.D.

When school boards fail to provide the free appropriate public education (FAPE) guaranteed in the Individuals with Disabilities Education Act (IDEA), students with disabilities and their parents can be compensated in various ways. One of the more common remedies is to reimburse parents for tuition and other costs they may have incurred in obtaining special-education and related services privately.

In spite of numerous cases on the issue of tuition reimbursement, including two from the Supreme Court (*Burlington School Committee v. Department of Education, Commonwealth of Massachusetts* [1985] and *Florence County School District Four v. Carter* [1993]), and an IDEA amendment that delineates conditions under which parents can be reimbursed for private school tuition (20 U.S.C. § 1412[a][10][C]), litigation in this area continues.

In *Forest Grove School District v. T.A.* (2008), the Supreme Court handed down its third pronouncement on tuition reimbursement, this time addressing whether a parent who places a child with a disability in a private school is entitled to tuition reimbursement if the child has never attended a public school. The Court held that students are not barred categorically from receiving private school reimbursement simply because they did not receive public school services first.

Forest Grove has important financial implications for school boards, as tuition reimbursement awards typically involve tens or even hundreds of thousands of dollars and often represent unplanned expenditures. However, for schools that, with due diligence, actively

seek out children who need services and ensure that individualized education program placements provide a FAPE, this ruling will have little to no effect.

The IDEA and Reimbursement

The language in the IDEA that caused the controversy states:

> If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency*, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment. (20 U.S.C. § 1412[a][10][C][ii]; emphasis added)

At issue in *Forest Grove* was the meaning of the phrase "who previously received special education and related services under the authority of a public agency"—language that was added to the IDEA in 1997.

Courts have considered whether Congress included this phrase in the statute specifically to bar tuition reimbursement when parents enroll a child in a private school without first giving the public schools the opportunity to develop and implement an appropriate individualized education program. In a previous attempt to settle the controversy, an equally divided Supreme Court let a Second Circuit judgment stand, thus failing to deliver a precedential opinion (*Board of Education of the City School District of the City of New York v. Tom F. ex rel. Gilbert F.* 2007).

Before the Ninth Circuit's decision in *Forest Grove*, a split developed among the circuit courts. In 2004, the First Circuit determined that tuition reimbursement was not available in circumstances where the child had not previously received special-education and related services from the public schools (*Greenland School District v. Amy N.* 2004). Conversely, the Second Circuit granted tuition reimbursement in two high-profile cases where the child had never received special education from a public agency.

In the first of those two cases, the Second Circuit had a completely different interpretation of the IDEA's language than the First Circuit had. The Second Circuit commented that the phrase did not indicate that tuition reimbursement was only available to parents whose child previously received special education from a public agency nor did it say that it was unavailable to parents whose child had not previously received special education (*Frank G. and Diane G. v. Board of Education of Hyde Park* 2006).

Subsequently, the Second Circuit vacated and remanded a federal trial court's denial of reimbursement by simply referencing its earlier decision (*Board of Education of the City School District of the City of New York v. Tom F. ex rel. Gilbert F.* 2006). The Supreme Court affirmed in a 4–4 tie; yet, insofar as the Court failed to render a majority opinion, it did not establish a precedent and effectively left the issue unsettled (*Board of Education of the City School District of the City of New York v. Tom F. ex rel. Gilbert F.* 2007).

The Case Specifics

Forest Grove School District v. T.A. involved a student, identified in court documents as T.A., who had difficulty paying attention and completing his schoolwork, but who nevertheless attended the public schools through the 11th grade. Although T.A. never repeated a grade, it may have been because he received extensive help with his schoolwork at home.

The Court held that students are not barred categorically from receiving private school reimbursement simply because they did not receive public school services first.

Before enrolling T.A. in the private school, his parents took him to an independent psychologist who diagnosed him with attention deficit/hyperactivity disorder (ADHD), depression, a math disorder, and cannabis abuse. The psychologist recommended placement in a residential program because of T.A.'s problems in school and at home. T.A. never received special-education services while in the public schools, even though it had been noted that he might have ADHD.

When T.A. was in the 11th grade, his parents withdrew him from the public schools and enrolled him in a private residential school that specialized in treating students with behavioral and emotional problems. After T.A. was enrolled in the private school, his parents requested that school officials evaluate him a second time. They determined he was ineligible for services under the IDEA.

The evaluation team acknowledged that T.A. had ADHD and showed signs of depression, but it found that he did not qualify under the IDEA as having a learning disability because the diagnoses did not have a severe

effect on his educational performance. Another team convened and decided that T.A. was also ineligible for services under Section 504 of the Rehabilitation Act of 1973.

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After the parents initiated an administrative due process hearing, a hearing officer determined that T.A. had disabilities and was eligible for special education because of his ADHD. The hearing officer ruled that school board officials had failed to offer T.A. a FAPE and was therefore responsible for the costs of his private school placement. On appeal, in an unpublished decision, the federal trial court in Oregon reversed the award of tuition reimbursement, finding that the parents were statutorily ineligible for reimbursement under the IDEA.

In a 2–1 decision, the Ninth Circuit reversed the lower court, essentially agreeing with and adopting the reasoning and analysis of the Second Circuit's decision in *Frank G.* The court noted that the expressed purpose of the IDEA was to ensure that all students with disabilities were afforded the opportunity for a FAPE. Interpreting the IDEA as prohibiting reimbursement to students who have not yet received special-education and related services from a public school, in the court's view, ran contrary to this express purpose.

Further, the court saw that such a ruling would mean that parents would have to wait until the child had received special education from a public school before sending the child to an appropriate private school, regardless of how uncooperative school personnel and how inappropriate the special-education services were.

Thus, the court held that a student who had not previously received special-education and related services in a public school setting was eligible for tuition reimbursement.

Supreme Court's Opinion

Reading the statute as a whole, the Supreme Court justices determined that reaching any other decision would have left some students without a free education. Further, the Court maintained that a different ruling would have allowed school boards to violate the "child find" provision of IDEA, which requires officials to seek out students for services.

Affirming the decision of the Ninth Circuit, the Supreme Court ruled that when school board officials fail to provide FAPEs to students, the judiciary or hearing officers must consider relevant factors, such as notice provided by the parents and boards' opportunities to evaluate children to determine whether reimbursement should be provided. The justices held that since the trial court did not consider these factors properly, it had to do so on remand.

Conclusions

Although critics of *Forest Grove* may argue that it will result in a significant increase in unilateral private school placements, resulting in tens of thousands of unexpected and unbudgeted expenditures, the reality is not so grim. As in the past, to be reimbursed, parents will have to show that school boards failed to provide a FAPE and that their unilateral placements in private schools provided an appropriate education for their children.

Further, consistent with the IDEA and case law, parents would need to give their school boards proper notice of their dissatisfaction with the decisions of education personnel regarding the provision of an aspect of the special-education process.

Forest Grove provides relief only in a relatively few situations where students did not receive special education from public agencies. Even so, courts retain their traditional powers of equity and may deny or reduce reimbursement awards in situations where the parents' unilateral actions are judged to be unwarranted.

Forest Grove does not open the door to allowing reimbursement awards to parents who fail to cooperate with school boards. The bottom line is that school board officials who properly identify students with disabilities and offer appropriate individualized education programs from the outset have nothing to worry about.

References

Board of Education of the City School District of the City of New York v. Tom F. ex rel. Gilbert F., 193 F. App'x 26 (2d Cir. 2006), *affirmed by an equally divided court*, 128 S. Ct. 1 (2007).

Burlington School Committee v. Department of Education, Commonwealth of Massachusetts, 471 U.S. 359 (1985).

Florence County School District Four v. Carter, 510 U.S. 7 (1993).

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Frank G. and Diane G. v. Board of Education of Hyde Park, 459 F.3d 356 (2d Cir. 2006).

Greenland School District v. Amy N., 358 F.3d 150 (1st Cir. 2004).

Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*

Rehabilitation Act, Section 504, 29 U.S.C. § 794.

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